Filed 11/4/10 In re T.W. CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re T.W., a Person Coming Under the Juvenile Court Law.	
CONTRA COSTA COUNTY CHILDREN & FAMILY SERVICES BUREAU, Plaintiff and Respondent, v. PAULINE W., Defendant and Appellant.	A127657 (Contra Costa County Super. Ct. No. J09-00854)

INTRODUCTION

Pauline W., mother of the child T.W., appeals from the order of the Contra Costa County Juvenile Court terminating her parental rights following a hearing held pursuant to Welfare and Institutions Code section 366.26.)[1] She contends that "insufficient detriment findings by clear and convincing evidence at any and all hearings" denied her due process as required by the Supreme Court in *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242 (*Cynthia D.*). We shall conclude her failure to timely challenge previous orders prevents her from raising issues connected with the detention, jurisdiction,

[1] All statutory references are to the Welfare and Institutions Code. All references to "Rules" are to the California Rules of Court, unless otherwise indicated.

disposition or setting of the section 366.26 termination hearing on this appeal. To the extent mother challenges the court's findings in connection with its termination of her parental rights, we shall find her claim meritless.

FACTS AND PROCEDURAL BACKGROUND

On June 8, 2009, respondent Contra Costa County Bureau of Children and Family Services (the Bureau) filed a petition alleging that the infant T.W. was described by section 300, subdivisions (b) and (j). The petition alleged that T.W. was at substantial risk of harm due to appellant's involvement in an incident of domestic violence while pregnant with T.W., in which appellant engaged in a verbal dispute and pulled a knife on an older sibling of the child (§ 300, subd. (b)) and the fact that three other children (the child's half-siblings) had been removed from appellant's care due to her substance abuse. Her parental rights were terminated as to two of those children and a third was in permanent placement. (§ 300, subd. (j).) At the contested jurisdiction hearing held September 28, 2009, the court took judicial notice of the child's siblings' cases without objection and admitted the reports into evidence. The court found true the allegations of the petition.

At the disposition hearing held October 15, 2009, the court adopted the recommendations of the Bureau contained in the dispositional report, including the recommendation that mother be denied reunification services pursuant to section 361.5, subdivision (b)(10), concluding that appellant had not made reasonable efforts to treat the problems that led to the removal of the child's siblings, as required by the statute. Counsel for the parties *stipulated* that the court could "adopt the recommendations contained in the dispositional report dated 8/10/09 without formally reading same into the record." Among the findings recommended by the report, were recommendations that the court:

"1. Find that the child continues to be a person described by Welfare and Institutions Code Section 300, subdivisions (b) and (j) [¶] . . . [¶]

"4. Determine that the child is being removed for a reason stated in subdivision (c)(5) of Section 361, and that it is reasonable under the circumstances not to have made any efforts to prevent or eliminate the need for removal of the child from her home.

"5. Find by clear and convincing evidence that placement of the child with mother would be detrimental to the safety, protection, or physical or emotional well-being of the child.

"6. Pursuant to Section 361.5(b)(10), find by clear and convincing evidence that the Court ordered termination of Reunification Services for a half-sibling of the child because the mother failed to reunify with the half-sibling after that child had been removed from the mother pursuant to Section 361, that the child is now being removed from the custody of the same mother and that this mother has not subsequently made a reasonable effort to treat the problems that led to removal of the half-sibling of the child from that parent." The court set the section 366.26 selection and implementation hearing and advised appellant of the process for challenging its orders by filing a petition for extraordinary writ.

Appellant did not file appeals from any court orders preceding the section 366.26 hearing; nor did she petition for an extraordinary writ from orders made at the disposition hearing at which the court denied her reunification services and set the matter for a section 366.26 selection and implementation hearing.

In its report prepared for the section 366.26 hearing held February 9, 2010, the Bureau recommended that appellant's parental rights be terminated. Appellant submitted a trial brief objecting to the child's being placed with adoptive parents of a different race and claiming a bond with the child sufficient to preclude termination of her parental rights. (§ 366.26, subd. (c)(1)(B)(i).) The court noted that appellant had made some visits. On balance, the court found the relationship between appellant and the child was not strong enough to overcome the statutory and decisional law favoring termination of parental rights at that stage. The court found the recommendations of the report to be appropriate and followed them. It expressly found "by clear and convincing evidence that it's likely that the child will be adopted" and also "by clear and convincing evidence

that terminating parental rights is in the best interest of the child" and "by clear and convincing evidence [that] it would be detrimental to return the child to the parents[']custody." Counsel for the parties agreed to "waive irregularities" so that the court could "incorporate" the recommendations of the section 366.26 report into its "order without reading them aloud." The court terminated the parental rights of appellant and of the child's alleged father. This appeal followed.

DISCUSSION

On this appeal from the order terminating her parental rights following the section 366.26 hearing, appellant seeks to challenge the asserted failure of the court to make findings of detriment to the child by clear and convincing evidence at the detention hearing, at the jurisdictional hearing, and at the dispositional hearing that resulted in the order bypassing reunification services and setting of the section 366.26 selection and implementation hearing.[2] Appellant also contends the order following the section 366.26 hearing was defective in that the court made no finding based on clear and convincing evidence either of detriment to the child if returned to appellant, or of her parental unfitness.

Appellant reasons that under *Cynthia D., supra,* 5 Cal.4th at p. 256, the constitutionality of California's dependency scheme depends upon the court's making various findings as to detriment to the child by clear and convincing evidence at stages preceding the ultimate termination of parental rights and that those findings were not made here.[3]

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[2] We note that jurisdictional allegations need not be proved by clear and convincing evidence. (*In re Jennifer V.* (1988) 197 Cal.App.3d 1206, 1211.) It is at the dispositional phase of dependency proceedings that the clear and convincing evidence standard comes into play where the child is placed out of home. (*Id.* at p. 1210.)

[3] In holding that California's statutory scheme comports with due process, *Cynthia D.* reasoned:

"By the time termination is possible under our dependency statutes the danger to the child from parental unfitness is so well established that there is no longer 'reason to believe that positive, nurturing parent-child relationships exist' (*Santosky v. Kramer* [(1982)] 455 U.S. [745,] 766), and the *parens patriae* interest of the state favoring

A. ***Appeal orders preceding the section 366.26 hearing***

We agree with respondent Bureau that appellant has forfeited her right to raise issues relating to orders preceding the section 366.26 hearing by her failure to seek writ relief pursuant to section 366.26 subdivision (*l*) for orders made at the disposition hearing at which the court set the matter for a section 366.26 hearing.[4]

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preservation rather than severance of natural familial bonds has been extinguished. At this point, unlike the situations in *Santosky v. Kramer* and *In re Angelia P.* [(1981) 28 Cal.3d 908], it has become clear 'that the natural parent cannot or will not provide a normal home for the child' (455 U.S. at p. 767), and the state's interest in finding the child a permanent alternate home is fully realized. In light of the earlier judicial determinations that reunification cannot be effectuated, it becomes inimical to the interests of the minor to heavily burden efforts to place the child in a permanent alternative home. By the time of the section 366.26 hearing, no state interest requires further evidence of the consequences to the child of parental unfitness, let alone evidence that meets an elevated standard of proof.

"Considered in the context of the entire process for terminating parental rights under the dependency statutes, the procedure specified in section 366.26 for terminating parental rights comports with the due process clause of the Fourteenth Amendment because the precise and demanding substantive and procedural requirements the petitioning agency must have satisfied before it can propose termination are carefully calculated to constrain judicial discretion, diminish the risk of erroneous findings of parental inadequacy and detriment to the child, and otherwise protect the legitimate interests of the parents. At this late stage in the process the evidence of detriment is already so clear and convincing that more cannot be required without prejudice to the interests of the adoptable child, with which the state must now align itself. Thus the proof by a preponderance standard is sufficient at this point." (*Cynthia D., supra,* 5 Cal.4th 242, 256.)

[4] Section 366.26, subdivision (*l*) has provided at all relevant times in pertinent part as follows:

"(*l*)(1) An order by the court that a hearing pursuant to this section be held is not appealable at any time unless all of the following apply: [¶] (A) A petition for extraordinary writ review was filed in a timely manner. [¶] (B) The petition substantively addressed the specific issues to be challenged and supported that challenge by an adequate record. [¶] (C) The petition for extraordinary writ review was summarily denied or otherwise not decided on the merits. [¶] (2) Failure to file a petition for extraordinary writ review within the period specified by rule, to substantively address the specific issues challenged or to support that challenge by an adequate record shall preclude subsequent review by appeal of the findings and orders made pursuant to this section."

Neither the detention order nor jurisdictional orders are directly appealable. "Parties may raise issues pertaining to the detention hearing (the earliest orders in a case) in an appeal from the disposition, but a detention order is nonappealable in a practical sense because it is usually rendered moot by the subsequent orders made at the jurisdictional and dispositional hearings." (Cal. Juvenile Dependency Practice (Cont.Ed.Bar, 2009) § 10.2, p. 725.) Jurisdictional orders pursuant to section 300 are not directly appealable because they do not represent final orders. "While the jurisdictional order is not an appealable final judgment, any errors in the jurisdictional phase of the proceedings are reviewable on appeal from the dispositional order. [Citations.]" (*In re Jennifer V., supra,* 197 Cal.App.3d 1206, 1209.)

As stated by our Supreme Court in *In re S.B.* (2009) 46 Cal.4th 529, 531-532: " 'A judgment in a proceeding under Section 300 may be appealed in the same manner as any final judgment, and any subsequent order may be appealed as an order after judgment.' (§ 395, subd. (a)(1); [citations].) As a result of these broad statutory terms, '[j]uvenile dependency law does not abide by the normal prohibition against interlocutory appeals.' [Citations.] The dispositional order is the 'judgment' referred to in section 395, and all subsequent orders are appealable. [Citation.] ' "A consequence of section 395 is that an unappealed disposition or postdisposition order is final and binding and may not be attacked on an appeal from a later appealable order." [Citation.]' [Citations.] [¶] The Legislature has restricted the right of appeal in certain dependency contexts. (See §§ 366.26, subd. (*l*)(1) [orders setting § 366.26 hearings], & 328 [placement orders following termination of parental rights].)"

In a proceeding under section 300, "The order entered at the dispositional hearing is a final judgment. [Citations.] *It is appealable when it does not also set a [section] 366.26 hearing.*" (Cal. Juvenile Dependency Practice, *supra,* § 10.2, p. 725, italics added.)

In the instant case, the order entered at the disposition hearing *did* set a section 366.26 hearing. At the end of the disposition hearing at which it set the section 366.26 hearing, the court properly discharged its duty to give timely and correct notice to

appellant of the writ petition requirements. (§ 366.26(*l*)(3)(A).) Consequently, further review of that section 366.26 hearing setting order and all contemporaneous findings and orders from the disposition hearing could *only* be reviewed on petition for extraordinary writ, pursuant to section 366.26, subdivision (*l*). These include challenges to findings and orders made at previous detention and jurisdiction proceedings, that could only be challenged on review of the disposition orders.[5]

The Court of Appeal in *In re T.G.* (2010) 188 Cal.App.4th 687, 696, recently reiterated: " '*All orders issued at a hearing in which a section 366.26 hearing is ordered are subject to section 366.26, subdivision (l) and must be reviewed by extraordinary writ.* [Citation.]' (*In re Tabitha W.* (2006) 143 Cal.App.4th 811, 817.)" (Italics added; accord, *In re Merrick V.* (2004) 122 Cal.App.4th 235, 248; *In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1023; Eisenberg et al., Civil Appeals and Writs (The Rutter Group 2009) ¶¶ 2:164.10e -2:164.10h, pp. 2-85 – 2-87; Seiser & Kumli, Cal. Juvenile Courts (2010) § 2.190[10], p. 2-492.) This rule precluding non-writ review of findings and orders made contemporaneously with the order setting a section 366.26 hearing encompasses a contemporaneous order expressly denying family reunification services. (Eisenberg, et al., Civil Appeals and Writs, *supra,* ¶ 2:164.10f, p. 2-86, citing *In re Rebecca H.* (1991) 227 Cal.App.3d 825, 835-837.)

As explained by *In re Anthony B., supra,* 72 Cal.App.4th at p.1023: "The goals of expedition and finality would be compromised if the validity of these types of contemporaneous, collateral orders were permitted to be raised by appeal from the order itself or from a later permanent planning order and therefore allowed to remain undecided until well after the permanent plan was decided upon. The desired expedition and finality obviously would be most threatened when the permanent plan was adoption and termination of parental rights, the preferred plan which *must* be ordered if the child is

[5] We note that appellant did not simply choose the wrong method for review of the detention, jurisdiction and disposition findings and orders. Following the disposition hearing, she failed to seek review in any manner, but rather waited until her rights were terminated to seek appellate review.

found to be adoptable and the juvenile court cannot make any of the findings set out in section 366.26, subdivision (c)(1)(A) through (D)."

In re Tabitha W. agreed with the authors of California Juvenile Courts Practice and Procedure, "that such a rule is the only way to ensure that all outstanding issues will have been reviewed by the Court of Appeal prior to the section 366.26 hearing and that it is both conducive to judicial economy and sensitive to the increasing emphasis on the importance of expeditiously achieving finality in dependency matters in the best interests of the children affected by the process. (Seiser & Kumli, Cal. Juvenile Courts Practice and Procedure (2006) § 2.190 [10], pp. 2-368 to 2-369.)" (*In re Tabitha W., supra,* 143 Cal.App.4th at p. 817.)

Appellant's failure to challenge the court's findings and orders made at the disposition hearing (and orders that preceded the disposition) by a petition for extraordinary writ from that proceeding cannot be salvaged by her claim that the asserted failure of the court to make its findings by clear and convincing evidence denied her due process. "A parent's failure to appeal an appealable order at the appropriate time or to file a timely Rule 8.452 writ precludes subsequent appellate review of most issues, even issues involving important constitutional or statutory rights. [Citation.]" (Cal. Juvenile Dependency Practice (Cont.Ed.Bar 2009) § 10.37, p. 759, citing *In re Meranda P.* (1997) 56 Cal.App.4th 1143 [refusing to entertain challenges based on alleged denial of the right to counsel].) Nor was this a case where appellant did not receive proper notice or was denied the opportunity to be heard. Appellant had the opportunity to make her arguments regarding asserted deficiencies in the court's findings by filing a petition for extraordinary writ, as she was told by the court at the disposition hearing. She failed to do so and cannot resurrect these claims on this appeal from termination of her parental rights.

Were we to conclude that appellant had not forfeited her claims by failing to seek writ-relief as required by section 366.26, subdivision (*l*), we would conclude that adequate findings were made by the court where her counsel *stipulated* on her behalf and in her presence at the disposition hearing to the court's adoption of the recommendations

contained in the dispositional report without the need for the court to formally read same into the record. Appellant maintains that "mere reference to recommended findings" or incorporation by reference of the same "is not an adequate statement of reasons" and does not suffice for a finding of clear and convincing evidence of specific allegations of detriment to the child. However, none of the cases cited by appellant (which we note are criminal rather than dependency cases) involve counsel's express stipulation that the court may forego reading of the findings and may adopt the findings of the report without reading them into the record. This stipulation was a clear and knowing *waiver* of any requirement for an oral pronouncement of the findings.

B. ***Appeal of termination order following section 366.26 hearing.***

Appellant also contends the order following the section 366.26 hearing was defective in that the court made no finding based on clear and convincing evidence either of detriment to the child if returned to the parent, or of parental unfitness. We disagree.

At the section 366.26 hearing, the court terminates parental rights by making a finding, by clear and convincing evidence, that the child is likely to be adopted. (§ 366.26, subd. (c)(1).) The court expressly made this finding at the section 366.26 hearing. "If the court finds by clear and convincing evidence that the child is likely to be adopted if parental rights are terminated, the findings pursuant to [section] 361.5[, subd. (b)] that reunification services shall not be offered . . . shall then constitute sufficient basis for termination of parental rights, unless the court finds that termination would be detrimental to the child due to the existence of one of six statutory circumstances . . . ." (Seiser & Kumli, Cal. Juvenile Courts (2010) § 2.171[5][b], pp. 2-427-428.) The *parent* bears the burden of proof for the existence of one of the six statutory circumstances, including the parent-child relationship exception to termination. Under that exception, the parent must show that he or she has maintained regular visitation and contact with the child and the child would benefit from continuing the relationship to such a degree that terminating parental rights would be detrimental to the child. (*Ibid*; see section 366.26(c)(1)(B)(i).) Contrary to appellant's suggestion, at the termination proceeding, the court need not find the parent unfit and need not find that return to the parent would

be detrimental to the child. (See *In re Cynthia D.*, *supra*, 5 Cal.4th 242, 256.)[6] Appellant does not contend that these findings were unsupported by substantial evidence in the record. We conclude the court did not err in terminating parental rights at the section 366.26 hearing.

DISPOSITION

The order terminating parental rights is affirmed.

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Kline, P.J.

We concur:

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Haerle, J.

_____

Lambden, J.

[6] We note that the court here *did* find by clear and convincing evidence that "it would be detrimental to return the child to the parents[']custody."